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Sunday, September 17, 2006

Due process property rights

Modern legal commentators often refer to property rights as "mere economic rights." Epstein and others have argued against a strong distinction between economic and personal rights. This article argues that some kinds and aspects of property rights, especially those associated with owning, renting, or providing a residence, a communications service, or an article or servcie associated with a family or other intimate relationship, are much more than economic rights. Besides possibly falling under the Takings Clause, these property rights also fall under the Due Process Clause, the First or Fourth Amendments, or other constitutional rights depending on the nature of the property. Such property rights cannot consistently with the Constitution be taken merely by monetary compensation, even if taken for a public use, but may be taken or unduly burdened by regulation only if they are forfeit due to lawbreaking of the property owner or if a full and complete equivalent to the violated right is provided.

Although property law is commonly considered a branch of substantive rather than procedural law, this is a highly misleading categorization for the purposes of constitutional interpretation. Traditionally, obligations and rights associated with residence and property were at the core of common law procedural rights. "Due process" was and is considered synonymous with "the law of the land." "The law of the land" was guaranteed by the Magna Carta. Several state constitutions still protect "the law of the land" rather than "due process", but courts have always considered them to be synonymous. "The law of the land," under traditional common law, referred to core righs of property, person, and procedure that could be pled in the king's courts using the extraordinary writs, particularly *quo warranto*, *habeus corpus*, and prohibition. *Quo warranto* could not be used to take certain property rights unless those rights had been abused in violation of law and unless proper legal procedure was observed, just as under *habeus corpus* a person could not be imprisoned unless he or she was a lawbreaker and proper procedure was observed. Indeed the phrase "common law" originally referred, not to the "judge made law" of the king's courts generally, but only to that subset of the law that the king's courts could apply, via the extraordinary writs, in all parts of the land including against the many private (franchise) and Church courts. This is also the cf core meaning of "the law of the land" and "due process."

So much did the Framers of the United States Constitution considered property to be the core and paradigmatic constitutional right that they often (as in this essay) referred to intangible rights such as freedom of speech, association, belief as property rights in order to afford them greater protection. The Framers did not make a sharp distinction between property and other rights, and they certainly did not dismiss property rights as "merely economic."

These core common law rights could not be taken by mere compensation, but only due to illegal behavior by the rightsholder that forfeited the property right under law. Although these rights often referred to jurisdictional rights no longer recognized today, they also referred to rights that still have modern forms, such as "view of frankpledge," a local private police force whose modern forms

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include neighborhood watch programs and other community groups, "advowson", associated with community religious practice, and various rights to take action against people breaking the law on one's property or within one's residence, such as liberty of the house, with modern equivalents in "stand your ground" and other self-defense laws as well as Fourth Amendment rights restricting searches of residences and other property where there is a reasonable expectation of privacy.

Although many of these rights associated with residence, community, and jurisdiction now take a very different form, Due Process rights still include rights to build relationships with one's neighbors and community for safety, security, religion and other purposes that are more than economic. Then as now, personal jurisdiction was based on the location of one's residence. At the core of these rights is the right to live in the residence and neighborhood itself. Due Process rights also include special rights of safety, security, privacy, and self-defense within one's own residence. A regulation or property taking that does not provide a full substitute for such rights, rather than mere monetary compensation, and whether for public use or otherwise, violates core Due Process rights.

When jurisdiction, search and seizure rights, and rights of self-defense, among many other procedural rights, are based on property, a taking of that property, or a regulation that impacts such a right, may be a violation of Due Process rights. If so, the taking or regulation may not be accomplished by mere compensation. Rather, when Due Process rights are associated with property, this either poses an absolute bar to government action or requires a full substitution of the specific rights violated.

Furthermore, the rights of privacy, recognized as protected by Due Process Clause, are often associated with residence. As Justice Kennedy wrote in *Lawrence v. Texas:*

> Liberty [under the Due Process Clause] protects the person from unwarranted government intrusions into a dwelling or other private places...
>
> This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

The home itself is often another important element of family and other intimate relationships. When property is associated with personal relationships, intimate behavior, the expression of personal beliefs, or the protection of one's safety and privacy, it takes on special constitutional meaning and is entitled to greater constitutional protection. Many common individual rights enforced against the government inherently include property rights and freedom of contract (rights of property in motion). For example, the right to birth control and abortion includes the property rights to own birth control and abortion clinics and the freedom of contract to buy and sell birth control devices and abortion services. Freedom of the press includes the right to own a newspaper, to buy and sell newspapers on one's own terms, to hire journalists and editors and control their work, to contribute to political campaigns, and to spend money on political compaigns. Similarly, the Fourth Amendment and the Due Process Clause should include the property rights associated with those rights, such as property rights to the protected home, curtilage, and other areas with a reasonable expectation of privacy under the Fourth Amendment. A taking or regulation of such areas should require the government to provide equivalent privacy and security functions of buildings and other features, or be barred altogether from the regulation or taking, rather than mere monetary compensation, even when taken for a public use. Many constitutional rights have at their core rights of property and property in motion (contract) that are entitled to enhanced protection since they are not "merely" economic rights.

Posted by Nick Szabo at 9:04 PM

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spelman said...

Huh?

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